SOUTH AFRICA / JUDGMENT

Malusi Wekhaya Construction CC v Bargaining Council for the Civil Engineering Industry and Others (C479 & C480/2021) [2024] ZALCCT 2; (2024) 45 ILJ 858 (LC); [2024] 4 BLLR 397 (LC) (23 January 2024)

[2024] ZALCCT 2

COURT
Labour Court Cape Town

BEFORE
Rabkin-Naicker

CASE / FILE NUMBER
C479 & C480/2021

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Source record

THE LABOUR COURT OF
SOUTH AFRICA, CAPE TOWN
Case Numbers:C479 &
C480/2021
Reportable
In

the matters between:

MALUSI
WEKHAYA CONSTRUCTION
CC
Applicant
(REGISTRATION
NUMBER: 2009/088730/23)
and
THE
BARGAINING COUNCIL FOR THE
First Respondent
CIVIL
ENGINEERING INDUSTRY (“BCCEI’)
CHAIRPERSON
OF APPEAL BODY OF BCCEI
Second Respondent
NATIONAL
UNION OF PUBLIC SERVICE AND
ALLIED
WORKERS UNION (“NUPSAW”)
Third Respondent
H.T.

PELATONA PROJECTS (PTY) LTD
(REGISTRATION

NUMBER: 1999/028069/07)
Applicant
THE
BARGAINING COUNCIL FOR
CIVIL
ENGINEERING INDUSTRY ("BCCEI")
First Respondent
Date
Heard: 2 August 2023
Date Delivered: 23
January 2024 by means of email

JUDGMENT

RABKIN-NAICKER J

[1] These two applications for the review of a decision of the second respondent (the Appeal Body) were consolidated by the Court on the day of the hearing. The applicant under case number C480/2021 is the mother company of the applicant under case number C479/80. The decision of the Chairperson on appeal in respect of both is the decision sought to be reviewed.

[2] The applicants seek an order that the impugned decision made in respect of both applicants be substituted with an order that "the appeal is upheld and the applicant is fully exempted from the annual wage increment which was to be implemented from 1 September 2020, as well as the annual wage increment for 2020;" alternatively an order that "...the appeal is referred back to the Appeal Board for reconsideration".

[3] The applicants are civil engineering businesses falling under the jurisdiction of the First Respondent (the BCCEI). In terms of the relevant Collective Agreement applicable to members of the BCCEI, they are obliged to implement an annual wage increase in respect of their employees effective from 1 September 2020.

[4] On the 5 March 2021, the applicants submitted formal applications for exemption from payment of the annual bonus for 2020 and the annual salary increment which became payable from 1 September 2020. The applications were considered by the Exemption Board of the BCCEI on 26 March 2021.

[5] In respect of the application by Malusi Wekhaya Construction CC, the Exemption Board decision was as follows:

"It is accordingly the exemption board's decision not to grant the following exemptions applied for by the Applicant based on the Applicant's position.

· Exemption from the payment of the 2020 year-end bonus;

· Exemption from the implementation and payment of the September 2020 wage increase".

[6] The material grounds of an appeal of the above decision by Malusi Wekhaya Construction CC were as follows:

"4.1.3 The appellant therefore submits that the outcome of the Exemptions Committee was not reasonable within circumstances...

4.14 ...appellant will find itself in deep waters should its initial prayer for exemption not be granted. It is well-known amongst several businesses found within the civil engineering industry that wages payable usually constitutes the majority of expenses within its financial year. The only alternative in order to address same would lead to job losses....

4.15 ...due to the fact that a new Main Agreement is due for 2021, we do not believe that employees will be prejudiced to such an extent as to rid them of current benefits. The financial stability of several businesses are currently at dire straits and as such businesses have and had to seek alternative means."

[7] The appeal sought that ". the exemption outcome, dated 26th March 2021 and as received on the 6th April 2021, be overturned and that it be decided that the business is exempted from payment of the 2020 year-end bonus, including retrospective exemption of payment of the September 2020 annual increase, as implemented by the BCCEI on 1 September 2020."

[8] In as far as the application for an exemption by HT Pelatona Projects, an appeal against the refusal of an exemption had been initially heard in September 2020, and the refusal decision was appealed successfully with the application remitted to the Exemption Board for decision. The application was remitted dated 5 March 2021, and was for exemption of the payment of the annual bonus and the annual salary increment which became payable from 1 September

2020. The applicant avers that this application was essentially based on its financial status and that it provided detailed documentation in relation thereto. This exemption application was considered by the Exemption Board of the Council on 26 March 2021 and its decision was as follows:

"Decision

It is accordingly the Exemptions Board decision to grant the following exemptions:

· Full Exemption from the payment of the 2020 year-end bonus.

· Partial Exemption from the implementation and payment of the September 2020 wage increases, in that exemption from payment and implementation the September 2020 wage increases is granted only for the period of 1 September 2020 to 28 February 2021. The September 2020 wage increases as such are to be implemented with effect from March 2021."

[9] The above partial exemption decision was appealed and Pelatona sought that:

".....the exemption outcome , dated 26 March 2021 and as received on the 6th April 2021, be overturned and that it be decided that the business is exempted from payment of the 2020 year-end bonus, including full retrospective exemption of payment of the September 2020 annual increase, as implemented by the BCCEI on 1 September 2020."

[10] The Appeal Body sat on the 4 June 2021 and the impugned decision was conveyed to the applicants. The decision was conveyed as follows:

"7. The decision of the IAB on 04 June 2021.

7.1 The IAB convened on 04 June 2021 and acknowledged the receipt of the following documents:

7.1.1 The IAB received an email dated 21 May from Labour Stock – company representing HT Pelatona (Pty) Ltd and Umalusi Wekhaya (Pty) Ltd.

7.1.2 The Objection by NUPSAW was also noted.

7.2 The IAB considered the submissions and decided to uphold the IEB's decision on both Umalusi Wekhaya (Pty) Ltd and HT Pelatona (Pty) Ltd."

[11] The applicants submit that the above decision is reviewable in terms of section 158(1) (g) of the LRA and emphasize that no reasons were given for it. They submit that the Board failed to consider the merits of the appeals or at least to properly consider the appeals, in that it simply rubberstamped the decision of the IEB. The applicants argue that the Appeal Body was duty bound to consider the full reasons originally offered for the application for exemption from both applicants and consider the grounds of appeal in that context, which it did not do.

[12] In the wake of the review applications, a record was prepared by the First Respondent in respect of both applications which includes "full reasons for the appeal decision" in documents dated in or about October 2021 after receipt of the review applications. In both ex post facto reasons provided reference was made to the Council's Exemption Criteria i.e.: 'The Committee and IAB shall take into

consideration all the relevant factors, which may include, but shall not be limited to the following criteria:

i. Previous exemption granted

ii. Any special circumstances that exist

iii. The interest of the industry as regards:

a) Unfair competition

b) Collective bargaining

c) Potential for labour unrest

d) Increased employment

iv. The interest of employees as regards:

a) Exploitation;

b) Job preservation;

c) Sound conditions of employment;

d) Possible financial benefits;

e) Health and safety;

f) Infringements of basic rights.

v. The interest of the employer as regards to:

a) Financial stability;

b) Impact on productivity;

c) Future relationship with employees and trade unions;

d) Operational requirements."

[13] The transcribed record of the actual deliberations of the IAB leading to the impugned decisions does not engender any degree of confidence that the above criteria were systematically considered by the IAB. Some financial aspects relating to Pelatona were touched on. However, interrogation of these aspects was far from satisfactory and did not cogently deal with the proffered reasons for financial stress contained in the Notice of Appeal. As for the deliberations on Malusi, these amounted to a rubber stamping of the IEB decision and an expressed view that the Board wanted to get the appeal in respect of Malusi Wekhaya over and done with. I find myself in agreement with the submissions by the applicants that the transcript reflects an incoherent and irrational decision-making process. It is patent from the IAB deliberations that required criteria arising from the collective agreement were not dealt with. To claim that they were in an ex post facto document does not assist the IAB.

[14] In Tsogo Sun Caledon (Pty) Ltd and Others v Western Cape Gambling and Racing Board and Another[1], the SCA held as follows:

"The reasons given by the Board for arriving at the impugned decision must now be considered. This Court has set out why this is important:

'The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the courts have said that

such a decision would ordinarily be void and cannot be validated by different reasons given afterwards — even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalisation of a bad decision. Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide.'[2]

The Constitutional Court later commented on the question left open in this passage:

'It is true that reasons formulated after a decision has been made cannot be relied upon to render a decision rational, reasonable and lawful. However, a report by an expert will not necessarily constitute ex post facto (after the fact) reasons; it may merely explain the rationale of the reasons that were provided prior to the making of the decision.'[3]

What is clear from this passage is that ex post facto reasons must be excluded from consideration. These are reasons which did not form the basis for the decision at the time but are

subsequently formulated to meet the attack of a reviewing applicant. Of course, it is not always easy to distinguish the two. It is safe to say, however, that reasons which motivated the decision at the time must form the basis for the evaluation by a court."[4]

[15] These review applications fall to be considered in respect of the original 'reasons' given by the IAB. The original decisions fall woefully short of the requirements for fair and reasonable decision-making as is evident in paragraph 10 above. In Golden Arrow Bus Services (Pty) Ltd v SA Road Passenger Bargaining Council & others (2021) 42 ILJ 1446 (LAC) the Court held that the starting point of an enquiry such as that before me is:

".....is s 30(1)(k) which expressly provides for the inclusion of an exemption procedure in a collective agreement concluded by the parties to a bargaining council. It follows that the LRA therefore legally mandates that every bargaining council must provide for a procedure for exemption. It cannot follow that there is no supervision to be exercised by the Labour Court in respect of the manner in which a bargaining council conducts its activities or complies with a mandate specifically provided for in the LRA. Thus the grant of an exemption from the collective agreement concluded by the members of a bargaining council must be taken to constitute the performance of a function provided for in the LRA. That a functionary is required to perform the role of deciding whether an exemption should be granted is manifestly a performance conducted under the LRA and accordingly it must therefore follow that, in terms of s 158(1)(g) of the LRA, the Labour Court has jurisdiction to determine the legality of such a mandated procedure."

[16] The LAC made clear in that judgment that the principles enunciated in Hendricks v Overstrand Municipality and Another[5] apply in a case like this. As the LAC stated:

"[22] .....But, even if it is correct to find that the decision of an exemption panel does not constitute administrative action as defined in PAJA, most certainly it has been long established law that decisions of domestic tribunals may be subjected to review on common-law grounds. This position has been clear since the decision in Turner v Jockey Club of SA 1974 (3) SA 633 (A) where the court held that an internal tribunal which had not afforded a jockey a fair and impartial hearing was invalid because the

principles of natural justice were violated. The court in Turner went on to hold that, where the decision of a tribunal is vitiated by a disregard for the principles of natural justice, the matter cannot be corrected by the appeal proceedings before a higher tribunal but only by way of a complete rehearing of the matter de novo.

[23] Of equal relevance to this issue is the decision in Hendricks v Overstrand Municipality & another (2015) 36 ILJ 163 (LAC);

[2014] 12 BLLR 1170 (LAC) where this court recognised the broad powers of review which had been conferred particularly in terms of s 158(1)(h) and by extension by s 158(1)(g) of the LRA.

[24] Murphy AJA, in a carefully considered judgment, held at para 21 that there is strictly speaking no need to classify the decision as administrative action in terms of PAJA before a review will be competent under s 158(1)(h) of the LRA. This provision does not say that the Labour Court may review decisions of the state acting as employer on the grounds of review applicable to administrative action under PAJA. It does say that the Labour Court may do so on any grounds 'permissible in law'. Review under PAJA is only one kind of administrative law of review. Exercises of the public power are also reviewable on constitutional grounds of legality and rationality. Murphy AJA then went on to say that the submission by the appellant that review should be excluded because of the contractual arrangement and the private nature of the powers was not well founded. The judicial review of contractual disciplinary

proceedings is permitted in our law. Consequently, the application for review was permitted on these grounds which are 'permissible

in law' as contemplated in s 158(1)(h) of the LRA.

[25] It does not appear to me that any justifiable distinction can be drawn between a dispute dealing with the decision of an appeal body concerning an exemption application and a disciplinary hearing as was the case which confronted the court in Hendricks; hence the dicta in Hendriks are relevant to the disposition of the present appeal."

[17] The impugned decisions, read with the transcript of the deliberations that were held to reach them, evince a lack of rationality and in the Court's view offend the principle of legality. As stated in the Hendricks matter:

"Legality includes a requirement of rationality. It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary.[6] Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the rule of law."[7]

[18] In all the above circumstances the applications to review the impugned decisions must succeed. The appeals must be remitted back for due and proper consideration by the IAB. Given the context of the relationship between the parties, I do not make a costs order in this matter. I make the following order:

Order

1. The ruling of the Appeal Body of the BCCEI dated 4 June 2021 in respect of the applicants in cases number C479 and C480/2021 is set aside and remitted for due consideration anew.

2. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

For the Applicants: M.C. Louw instructed by Peyper Attorneys For the Third Respondent: Michael Garces instructed by Parker Attorneys

[1] (Case no 89/2021) [2022] ZASCA 102 (24 June 2022)

[2] National Lotteries Board and Others v South African Education and Environment Project

[2011] ZASCA 154 2012 (4) SA 504 (SCA) para 27 (references omitted).

[3] National Energy Regulator of South Africa and Another v PG Group (Pty) Ltd and Others [2019] ZACC 28; 2020

(1) SA 450 (CC) para 39 (references omitted).

[4] At paragraph 19

[5] (2015) 36 ILJ 163 (LAC)

[6] Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa

[2000] ZACC 1; 2000

(2) SA 674 (CC) para 85.

[7] Henricks supra at paragraph 28.

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